United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1625

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
ex rel. ANDREW LEE STEWART,

Petitioner-Appellant,

-against-

THE HONORABLE LEON J. VINCENT,
Superintendent,
Green Haven Correctional Facility,
Stormville, New York,

Respondent-Appellee.

B
P/S

Docket No. 74-1625

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
DENYING A PETITION FOR WRIT OF HABEAS CORPUS

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

1

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
ex rel. ANDREW LEE STEWART,

Petitioner-Appellant,

-against-

THE HONORABLE LEON J. VINCENT,
Superintendent,
Green Haven Correctional Facility,
Stormville, New York,

Respondent-Appellee.

Docket No. 74-1625

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
DENYING A PETITION FOR WRIT OF HABEAS CORPUS

QUESTION PRESENTED

Whether the refusal of the trial judge to excuse a juror who admitted he personally knew one of the State's key witnesses is a denial of appellant's Sixth and Fourteenth Amendment rights to an impartial jury and mandates the granting of a writ of habeas corpus.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) entered April 16, 1974, denying appellant's petition pursuant to 28 U.S.C. §2254 for writ of habeas corpus.*

The Legal Aid Society, Federal Defender Services Unit, was assigned pursuant to the Criminal Justice Act to represent appellant on this appeal.

Procedural Background

Appellant was convicted on September 2, 1970, of two counts of robbery in the first degree arising from the November 15, 1969, robbery of Haupt's Liquor Store in Riverhead, Long Island. He was sentenced to an indeterminate-to-twenty-five year maximum term of imprisonment on each count, the terms to run consecutively. The conviction was affirmed without opinion by the Appellate Division. People v. Stewart, 38 A.D.2d 689 (2d Dept. 1971). Leave to appeal to the New York Court of Appeals was denied by order dated February 2, 1972.

---

*A certificate of probable cause was issued on April 30, 1974.

Statement of Facts

A. The Trial

Appellant was charged with two counts of robbery in the first degree (9*). Both charges arose out of the November 15, 1969, robbery of Haupt's Liquor Store during which appellant was accused of causing serious physical injury to both Josephine Haupt and Karen DeCastri when he forcibly took approximabely $125 belonging to Mrs. Haupt and $9 belonging to Mrs. DeCastri.**

After the jury selection was completed, the jury sworn, and opening statements delivered, but before any evidence was given, it was revealed that one of the jurors, Joseph Napoli, knew Patrolman Franklyn Brunskill, a key witness for the prosecution (89). Inquiry by the trial judge established that Napoli knew Brunskill as a fellow employee at Grumman's Aerospace Plant (89), and that the two had played softball together there during lunch hours (90). Upon Napoli's

---

*Numerical references in parentheses are to pages of the trial transcript dated June 15-23, 1970. The transcript was not part of the record before the District Court. It was obtained from the County Court in Suffolk County and has been lodged with the Clerk of this Court.

**Based on the same event, the indictment also charged two counts (counts three and four) of robbery in the first degree in that appellant displayed what appeared to be a pistol, and two counts (counts five and six) of assault in the second degree. The jury did not consider these counts (10).

assertion that his association with Brunskill would not affect his consideration of this case, coupled with his stated preference for sitting on the case (90), the judge, over defense counsel's objection (91), allowed Napoli to remain on the jury.

The testimony of Josephine Haupt (91-326) and Karen DeCastri (326-529) asserted that it was appellant who entered Haupt's Liquor Store at approximately 9:00 p.m. on a Saturday night. They asserted he told Mrs. Haupt to go to the back of the store, and that, when she refused, he beat both women. Both witnesses asserted that their assailant did not demand money, and neither woman saw him take money from the cash register or take Mrs. DeCastri's purse, which had been placed under the counter (119, 497). Both witnesses were present in the store throughout the time their assailant was in the store. According to Mrs. DeCastri, she had an opportunity to escape and seek aid only when the assailant, in pursuit of Mrs. Haupt, had left the store (355).

The only evidence directed at establishing that appellant had taken money from the cash register and the purse (which contained approximately $9) was the testimony of Patrolman Brunskill (660-763) and his partner, Robert Quinn (531-659). Both men asserted that a distance from the liquor store they observed a man running (539, 688). Although the police car in which the officers were riding was operating without headlights (538), the officers testified identically

that they saw, some distance from the car, that this man was carrying a purse* (540, 669). Brunskill also maintained that as the police vehicle approached this running figure, he dropped the purse and disappeared into the woods (672). Brunskill tackled appellant in the woods approximately twenty-five feet from the road (673) According to the officers, after apprehending appellant they returned to the spot where the fleeing figure had entered the woods, where they found the purse (673). In the bag were papers identifying Karen DeCastri, a wallet containing $9, and $59 in loose currency** (768-70). According to the officers, there were loose bills blowing in the wind and lying on the ground around the purse, but they did not attempt to retrieve any of the money (677).

Thereafter, on cross-examination of Brunskill, it was revealed that before Brunskill's testimony he had met the juror Napoli in front of the courthouse and the two had discussed their current employment. Brunskill asked Napoli if he was at the courthouse to serve as a juror on a case. Napoli replied that he was, and then volunteered that it was a criminal case. In response to further questions, and in direct violation of the trial court's repeated and explicit

---

*Quinn's testimony is contradictory in that after he explicitly testified that the headlights were not on, he subsequently (539) asserted that he observed a fleeing figure in the headlights of the car.

**Mrs. Haupt testified that $126 was missing from the cash register (157).

instructions, Napoli acknowledge to Brunskill that he was sitting on the Stewart case (686). According to Brunskill, no

---

*Throughout the week-long trial, prior to every recess the judge cautioned the jury in substance as follows (47-49):

> ... We will suspend for the day.
>
> Gentlemen, a few, but very few of you, were in the box when we suspended for the noon recess. Particularly for the benefit of you gentlemen who have never served in a criminal case before I will say to you each time, whether you have been sworn in as jurors or not, whenever you leave the jury box it is the duty of the Court to admonish you. Do not discuss the case among yourselves. Do not talk to anyone else about it. Do not read anything about it if you should happen to see it in your local newspapers. And, of course, if you hear anything about it on the radio turn it off. Do not try to approach the scene where this crime is alleged to have occurred, here in the town of Riverhead. Keep an open mind, form no opinion and come to no conclusion as to the guilt or innocence of the defendant.
>
> When you return to your prospective homes, gentlemen, it is quite possible that your wives or some member of your family may ask you if you were selected for the jury. You may tell them that you are in -- that the jury is in the process of being selected and you have been called into the box. But do not tell them what the case is about. The danger is that they may have read something recently in the paper and start discussing that with you which is not germane to this case and may be unfair to this defendant as well as unfair to the People. So simply state you have been called into the box, the jury is in the process of being selected. But do not discuss the facts or even the type of case with anyone in your family.
>
> Emphasis added.

more was said. Over strenuous objection, the trial court precluded inquiry be defense counsel as to any further conversation between Brunskill and Napoli and as to the nature of their friendship. Defanse counsel then moved for a mistrial (687). The motion was denied.

After deliberation, the jury convicted appellant of two counts of robbery in the first degree (1103). The jurors did not consider the two counts of assault in the second degree because they had been instructed that those counts merged in the first degree robbery convictions (1103-04).

On September 2, 1970, pursuant to a plea by the Assistant District Attorney (S.7-8*), appellant was sentenced to a twenty-five-year term of imprisonment on each of the two counts, the terms to run consecutively.

B. The Decision Below

In his opinion denying the petition for writ of habeas corpus, Judge Costantino summarily concluded as to appellant's several claims of error** that:

> The rest of relator's claims pertain to prejudicial statements made during the course of his trial

---

*Numerals in parentheses preceded by "S" are to pages of the minutes of the sentencing proceeding.

**Only the claim of suggestive pre-trial identification procedures received specific treatment in the opinion. The entire opinion is annexted as "B" to appellant's separate appendix.

and several adverse rulings of the trial judge. The court finds them to be without merit; for assuming arguendo that they are true and that they constitute errors under state law, they do not give rise to a violation of the federally protected right to a fundamentally fair trial. The claimed errors are of no substance, and neither singly nor in their totality are so egregious as to have deprived relator of a fair trial. United States ex rel. Birch v. Fay, 190 F.Supp. 105 (S.D.N.Y. 1961).

Opinion, at 3.

ARGUMENT

THE REFUSAL OF THE TRIAL JUDGE TO EXCUSE A JUROR WHO ADMITTED HE PERSONALLY KNEW ONE OF THE STATE'S KEY WITNESSES IS A DENIAL OF APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY AND MANDATES GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS.

In his opinion denying appellant's petition for a writ of habeas corpus, Judge Costantino held that the claim that appellant was denied his right to a fair and impartial jury by the friendship of a juror with a key prosecution witness did not present an issue of constitutional dimensions, as required by 28 U.S.C. §2254. This is error. A defendant's right in a state prosecution to a fair and impartial jury is guaranteed by the Sixth and Fourteenth Amendments. That right includes protection from any outside influences exerted on the jurors. Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); United States ex rel. DeLucia v. McMann, 373 F.2d 759 (2d Cir. 1967). For that reason, any private communication between a juror and a witness is absolutely forbidden. Mattox v. United States, 146 U.S. 140, 150 (1892). In this regard, an improper influence on only one juror destroys the requisite impartiality of the entire jury. Tillman v. United States, 406 F.2d 930, 937 (5th Cir. 1969); Stone v. United States, 113 F.2d 70,

77 (6th Cir. 1940). A verdict delivered by a jury whose impartiality has been thus infringed is invalidated. Tillman v. United States, supra; Pekar v. United States, 315 F.2d 319 (5th Cir. 1963); Wheaton v. United States, 133 F.2d 522 (8th Cir. 1943).

In the instant case, the record of the trial establishes without contradiction* that juror Joseph Napoli personally knew Officer Brunskill. Napoli conceded that he had previously worked with Brunskill at Grumman's Aerospace Plant. Moreover, the two socialized during their lunch hours. Despite this personal acquaintenceship, the trial judge refused, over defense counsel's objections, to excuse Napoli.

At this juncture, it was only the judge who could have excused the juror. Since the revelations about the juror's friendship with Brunskill were made before any evidence had been received, the judge, under New York law, had the power to discharge the juror. C.C.P. §371.** In contrast, however, since the jury had already been sworn, defense counsel could no longer exercise a peremptory challenge. C.C.P. §369.

Napoli's unsubstantiated assertion that his friend-

---

*It became apparent during preparation of the brief on this appeal that the transcript of the trial was not before the District Judge when he decided this case.

**Appellant was tried in 1970 when the New York State Code of Criminal Procedures was still in effect.

ship with Brunskill would not affect the impartiality of his deliberations, especially in light of his expressed affirmative desire to serve on this particular case, did not suffice to remove the clear prejudice created by the relationship. That such prejudice existed is further demonstrated by the fact that during the trial Napoli and Brunskill had a conversation on the steps of the courthouse. There, they discussed their respective employment situations and also, in direct contravention of the judge's cautionary instructions, Napoli revealed to Brunskill that he was serving on the jury in the Stewart case.

Not only does this episode establish that Napoli was incapable of following the judge's instruction, which contained a specific caveat not to mention the name of the case to anyone, but also, because of his relationship to Brunskill, that he was susceptible to outside influence.

In light of the friendship between Napoli and Brunskill, this improper communication mandated that Napoli be excused. In Jordan v. United States, 408 F.2d 1305 (D.C. Cir. 1969), when a juror merely spoke to a witness who was a member of his parish and they did not discuss the case, the juror was discharged and replaced with an alternate. Similarly, in United States v. DiPrima, 472 F.2d 550 (1st Cir. 1973), a juror was excused merely for asking a witness if he knew some of the juror's out-of-town relatives. See also Pekar v. United States, supra.

In the instant case, during the improper conversation between the juror and the witness, the trial was discussed. Despite Brunskill's protestations that nothing more than the name of the case was mentioned,* the record is silent as to how the juror Napoli perceived Brunskill's overtures of friendship and questions to him about the identity of the case on which Napoli was sitting. This is particularly relevant when, shortly after their conversation, Brunskill took the witness stand to testify.

Moreover, in the context of the prosecution's case, this communication was particularly prejudicial, since Brunskill's credibility was essential to establishing sufficient evidence for a conviction on a charge of robbery in the first degree. Neither Josephine Haupt or Karen DeCastri could testify that appellant had taken the money. It was Brunskill and Quinn who testified identically to seeing appellant carrying the DeCastri purse and to apprehending appellant in close proximity to the handbag. Disbelieving this testimony, the jury could only have convicted appellant of assault in the second degree, a crime carrying a maximum penalty of seven years. P.L. §§120.05, 70.00.

On this record, the judge's refusal, on defense counsel's request, either to excuse Napoli from the jury or grant a mistrial, mandates the grant of the petition for writ of habeas corpus.

---

*Defense counsel was precluded from testing this bald assertion by <u>any</u> cross-examination.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed, the petition for writ of habeas corpus granted, and appellant released unless he is granted a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

Certificate of Service

June 28, 1974

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.